

**FEDERAL COMMUNICATIONS COMMISSION  
WASHINGTON, D.C. 20554**

JUN 14 1994

IN REPLY REFER TO:  
1800B3-AJA

Cloud Nine Broadcasting, Inc.  
Radio Station KDBR(FM)  
900 W. Reserve #349  
Kalispell, MT 59937

In re: KDBR(FM), Kalispell, MT  
Cloud Nine Broadcasting, Inc.  
("Cloud Nine")  
BPH-931004IB

Dear Applicant:

KDBR(FM) is currently operating pursuant to automatic program test authority on Channel 292A with the facilities specified in pending license application BLH-931110KB. The above-captioned application proposes to upgrade to Class C2 facilities at KDBR(FM)'s current operating site utilizing the one-step process pursuant to the Report and Order in MM Docket 92-159.<sup>1</sup>

Prior to the submission of the subject application (BPH-931004IB), Cloud Nine initiated a rulemaking proceeding, MM Docket 93-159, to upgrade the Kalispell Channel 292 allotment to Class C2. In a Report and Order adopted on August 30, 1993 and released on September 21, 1993, Channel 292C2 was substituted for Channel 292A at Kalispell. See 8 FCC Rcd 7021 (1993). The docket became administratively final on October 27, 1993. The effective date of the Class C2 allotment was established as November 8, 1993. The subject application (BPH-931004IB) was filed on October 4, 1993, thirty-five days prior to the November 8, 1993 effective date of the Kalispell allotment.<sup>2</sup>

In general, a petition for rulemaking is processed on a first-come/first-served basis with respect to any later-filed construction permit application not timely filed as a counterproposal to the rulemaking. An earlier filed petition for

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<sup>1</sup> In the Report and Order in MM Docket 92-159, *Amendment of the Commission's Rules to Permit FM Channel and Class Modifications by Application*, 8 FCC Rcd 4735, effective August 18, 1993, the Commission modified its rules to permit licensees and permittees to request by application upgrades on adjacent and co-channels modifications to adjacent channels of the same class, and downgrades to adjacent channels.

<sup>2</sup> We note that, in the the cover letter for the application, your attorney acknowledges that the Report and Order for MM Docket 93-159 was released on September 21, 1993 and becomes effective November 8, 1993.

rulemaking automatically precludes action on any later-filed conflicting minor change application until the rulemaking becomes final. The mere filing of a one-step minor change application outside the counterproposal filing period has no effect on the outcome of the rulemaking. After the rulemaking becomes final, the conflicting permit application is subject to dismissal unless the conflict with the permit or allotment reference coordinates is removed. See Report and Order, MM Docket 91-348, 7 FCC Rcd 4917 (1992); *recon. granted in part and denied in part*, 8 FCC Rcd 4743 (1993). See also Example 5 in the Public Notice, "Mass Media Offers Examples of the Treatment of Applications Under the New 'One-Step' Process Including Treatment of Conflicts Between Petitions for Rule Making to Amend Part 73.202(b) and New FM and Major Change Applications," released August 31, 1993, Mimeo No. 34706; Report and Order in MM Docket 92-159, 8 FCC Rcd 4735 (1993).

The Report and Order in MM Docket 92-159, *supra*, which adopted the "one-step" application process, stated that an applicant could withdraw a previously filed rulemaking petition and substitute a one-step application. This did not occur in the instant case. Cloud Nine filed its one-step application on October 4, 1993. However, MM Docket 93-159 became administratively final on October 27, 1993 and effective on November 8, 1993 without Cloud Nine taking any action either to withdraw its petition, seek reconsideration of the Report and Order, or to stay that proceeding.<sup>3</sup> Accordingly, the instant application, to the extent that it requests modification of the Table of Allotments, is moot and will be dismissed. Moreover, the application, to the extent that it requests facilities to implement the Class C2 allotment, is untimely filed with respect to the effective date of the Report and Order in MM Docket No. 93-159 and is unacceptable for tender.<sup>4</sup>

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<sup>3</sup> The mere filing of a one-step application cannot be assumed to be a petition for reconsideration of the rulemaking proceeding.

<sup>4</sup> In the Report and Order in MM Docket No. 91-347, *Amendment of Part 73 of the Commission's Rules to Modify Processing Procedures for Commercial FM Broadcast Applications*, 7 FCC Rcd 5074, 57 Fed. Reg. 34872, released July 27, 1992, at paragraph 16, the Commission stated:

Our establishment of the above minimum filing requirement does not alter the fact that under our rules and policies certain defects related to the filing of broadcast applications are uncorrectable [Footnote omitted]. For example, an applicant cannot cure through amendment the problems of premature or late filing, inconsistent applications, or failure to pay the required application fee. See 47 C.F.R. Sections 1.1107, 73.3564(d), 73.3518. Applications which are patently not in accordance with our substantive rules will be considered defective and will not be accepted for filing unless accompanied by an appropriate waiver request. See 47 C.F.R. Section 73.3566.

Accordingly, in light of the above, Application BPH-931004IB, to the extent that it requests modification of the Table of Allotments, IS HEREBY DISMISSED AS MOOT. Furthermore, Application BPH-931004IB, to the extent that it seeks to implement Class C2 facilities in response to the *Report and Order* in MM Docket No. 93-159, IS HEREBY RETURNED as inadvertently accepted for tender. This action is taken pursuant to 47 C.F.R. § 0.283. Be advised that, should you refile your application, the application must be accompanied by the appropriate rulemaking fee. Please note that we would act favorably on a request for expedited processing of such application.

Sincerely,

A handwritten signature in black ink that reads "Dennis Williams". The signature is written in a cursive, slightly slanted style.

Dennis Williams  
Chief, FM Branch  
Audio Services Division  
Mass Media Bureau

cc: Pepper & Corazzini  
Lawrence L. Morton Associates